IN THE

# Supreme Court of the United States

**October Term 1977**

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**No. 77-140**

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KIWANIS CLUB OF GREAT NECK, INC., FLORENCE BROMLEY, CLARA HAFT, VIRGINIA NATHANSON AND SUNYA STRICK,
*Petitioners,*

FOR A DECLARATORY JUDGMENT

*—against—*

BOARD OF TRUSTEES OF KIWANIS INTERNATIONAL and THE NEW YORK DISTRICT OF KIWANIS INTERNATIONAL,
*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT

Petitioners, Kiwanis Club of Great Neck, Inc. Florence Bromley, Clara Haft, Virginia Nathanson and Sunya Strick, respectfully request that a writ of certiorari issue to review the decision of the New York State Court of

Appeals, which affirmed the decision of the New York State Appellate Division, Second Department, which affirmed with a dissent, the decision of the Supreme Court of the State of New York, Nassau County, which granted summary judgment in favor of the defendants.

## Opinion Below

The Court of Appeals affirmed the judgment in a memorandum decision entered April 28, 1977. That decision is annexed hereto as Appendix A. The New York State Appellate Division, Second Department, affirmed the lower court in an order entered May 17, 1976. The order and the opinion upon which it was based are annexed hereto as Appendix B. The Supreme Court of the State of New York, Nassau County, granted summary judgment on November 21, 1975. That judgment is annexed hereto as Appendix C.

## Jurisdiction

The jurisdiction of this Court is invoked pursuant to U.S. Code, Title 28, § 1257(3). No application for an extension of time has been made.

Where the majority opinion of the highest state court holds that a federal question is properly before it, the federal question is assumed to have been properly raised. *Whitney* v. *California*, 274 U.S. 357 (1926), *Coleman* v. *Alabama*, 377 U.S. 129 (1963).

## Questions Presented

1. Is Kiwanis International a forum in which members seeking business and professional opportunities meet and advance their individual economic and commercial interests, and as such governed by the provisions of the



Federal Civil Rights Act of 1964 (U.S. Code, Title 42, § 2000a et seq.) dealing with discrimination in employment and places of public accommodation?

2. Do the provisions of the by-laws of Kiwanis International which call for utilization of state court judgments or decrees for the dissolution of corporate affiliates necessarily involve state action, so as to bring the defendant within the purview of the equal protection clause of the Fourteenth Amendment?

3. Was the manner in which the court below granted summary judgment in favor of the defendant warranted by the evidence before it? If not, were plaintiffs thereby denied a federal right under the Civil Rights Act of 1964, and should the Court therefore make an independent examination of the facts to determine whether or not Kiwanis is within the "private club" exception to the Civil Rights Act of 1964, as per *Fiske* v. *Kansas*, 274 U.S. 380,, 385-6 (1926)?

## Statutory Provisions Involved

28 U.S. Code § 1257

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States.

U.S. Code Title 42 § 2000a

Subchapter II—Public Accommodations

§ 2000a. Prohibition against discrimination or segregation in places of public accommodation.

(a) Equal access.

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

* * * * *

(e) Private establishments.

The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section. (Pub. L. 88-352, title II, § 201, July 2, 1964, 78 Stat. 243.)

N.Y. State Civil Practice Act § 3212(b)

(b) Supporting proof; grounds, relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact other than an issue as to the amount or the extent of the damages. If it shall



appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.

U.S. Constitution

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## Statement of the Case

Plaintiff, Kiwanis Club of Great Neck, Inc., a domestic corporation, hereinafter referred to as the local club, was duly chartered by defendant, Kiwanis International, hereinafter referred to as International. The provisions of the International Constitution and By-laws restricted membership in local clubs to "men of good character and community standing residing or having other community interest within the area of this club."

In October, 1973, the local club admitted to membership several women, including the individual plaintiffs, Florence Bromley, Clara Haft, Virginia Nathanson and Sunya Strick. Shortly thereafter, the local club adopted a resolution permitting women to become members of the local club. The aforementioned women plaintiffs were all of good character and community standing and had business affiliations within the area of the local club in Great Neck. They joined the club for the same reasons as male members joined Kiwanis, to serve the community and to make commercial and business

contacts within the setting of a service organization. These business contacts and associations furthered the development of their businesses within the community.

Following notice by the local club that women had been admitted, the International voted to revoke the local club's charter. The club appealed this decision internally to the General Convention of Kiwanis International in June, 1975, but the decision was sustained.

On July 3, 1975, defendant, Kiwanis International, notified the local club that pursuant to the International's By-laws, the charter of the local club was revoked and the club (a New York corporation) shall be dissolved.

An action was immediately commenced in Supreme Court, Nassau County, on July 8, 1975, by the local club and the women plaintiffs for a declaratory judgment that the by-laws be declared unconstitutional. Defendants cross moved to dismiss the complaint and for summary judgment. Plaintiffs submitted extensive affidavits of individual Kiwanis members to prove the business nature of Kiwanis. Defendants submitted no evidence to rebut this proof and relied instead on their attorney's affidavit which baldly asserted that Kiwanis was private in nature.

By the decision and judgment of the Hon. Alexander Berman, the rights of the parties were declared and summary judgment granted in favor of the defendants. An appeal was taken by the plaintiffs to the Appellate Division, Second Department. By its decision dated March 22, 1976, the Appellate Division affirmed the judgment of the lower court, with a scholarly dissent by the Hon. Irwin Shapiro. Plaintiffs further appealed to the New York State Court of Appeals, which on April 28, 1977, affirmed the decision of the Appellate Division, Second Department. From this decision a petition for a Writ of Certiorari is being made.



## Reasons for Granting Writ

### I

The issue presented in this case is the policy of Kiwanis International of excluding women from membership. It is a matter of federal policy to promote equality of employment opportunities, Civil Rights Act of 1964 (U.S. Code, Title 42, § 2000 et seq.) As women have moved into higher levels of the business community, they have come to recognize the importance of business club membership for commercial contacts and employment opportunities. Many of these organizations restrict their membership to males only. To the degree that business contacts are thwarted, employment opportunities are thus denied to women. Some of these clubs characterize themselves as "private," and argue that they are exempt from the Civil Rights Act of 1964. Others, under varying degrees of compulsion, have admitted women as members.

The issue of how to construe the term "private club" in the Civil Rights Act, U. S. Code, Title 42, § 2000a et seq., has not yet been settled by this court. The only comprehensive guidelines appear in a Federal District Court case, *Wright* v. *Cork Club*, 315 F.S. 1143 (S.D. Texas, 1970).

When do clubs lose their "private" status so as to become "public" accommodations" under the Civil Rights Act? This question has not been addressed by the Supreme Court except in *Moose Lodge No.* 1070 v. *IRVIS*, 407 U.S. 163 (1972), a case easily distinguishable from the case at bar since both sides *stipulated* in *Moose Lodge* that the fraternal organization was private in nature.

The problem of sex discrimination in clubs is one of growing importance. The New York City Commission on Human Rights held hearings on this subject, and in 1975 issued a report entitled "Behind Closed Doors: Discrimination in Private Clubs," which was made part of

the record below. According to the report, "the correlation between club membership and achievement in business and in the professions has been well documented."

The benefits of business club membership include (1) social prestige qualifying one for leadership positions, (2) contacts leading to business and employment, and (3) access to channels of communication which would not be available outside the club setting. If women are to be provided with equal employment opportunities, they must have access to those clubs which provide business and employment opportunities while ostensibly purporting to be engaged in civic and community activities. This is the situation with defendant, Kiwanis International. Petitioners concede that truly private clubs may exclude whomever they choose. Petitioners argue, however, that Kiwanis International is not a private club but is instead a business organization.

## II

Under the Federal Civil Rights Act of 1964, (U.S. Code, Title 42, § 2000a et seq., discrimination on the basis of sex in either employment or in a place of public accommodation is prohibited. A "private club" constitutes an exception to the prohibition against discrimination.

The minimum federal criteria for "private clubs" were set forth in *Wright* v. *Cork Club*, 315 F.S. 1143 (S.D. Texas, 1970). The standards set forth are:

1. An organization which has permanent machinery established to carefully screen applicants for membership and who selects or rejects such applicants on any basis or no basis at all;

2. Which limits the use of the facilities and the services of the organization strictly to members and bona fide guests or members in good standing;



3. Which organization is controlled by the membership either in the form of general meetings or in some organizational form that would and does permit the members to select and elect those member officers who control and direct the organization;

4. Which organization is non-profit and operated solely for the benefit and pleasure of the members; and

5. Whose publicity, if any, is directed solely and only to members for their information and guidance.

Article II of the Kiwanis International charter states as one of its objects:

> "To provide, through Kiwanis clubs, a practical means to form enduring friendships, *to render altruistic service, and to build better communities.*" (Emphasis added).

Community service relates to a public rather than a private organization. Thus, by the terms of its own charter, Kiwanis does not meet the standards for a private club as set forth in *Wright* v. *Cork Club*. (*Supra*) Kiwanis' services, operations and publicity are directed not only towards its members, but towards the community in which it exists. Its purpose is noble, but certainly not private. One can hardly pick up a newspaper without reading about the services Kiwanis performs for the *public at large*, including fairs, picnics, antique shows and the like.

In holding that Kiwanis International is a private club, the decision of the New York State Court of Appeals is in direct conflict with that of the Federal District Court in *Wright* v. *Cork Club*, *Supra*, on the federal question of what constitutes a "private club" under the Civil Rights Act of 1964. Such a conflict will support a petition for a writ of certiorari.[1]

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[1] Stern, Robert and Gressman, Eugene, "Supreme Court Practice," 4th Edition, Bureau of National Affairs, Washington, D.C. (1969).

III

Kiwanis is a business organization through which commercial contacts are made.

Article V, Section 4 (b) of the Kiwanis constitution states as follows:

> "The active membership of this Club shall be composed of a cross-section of those who are engaged in recognized lines of business, vocation, agriculture, institutional or professional life; or who having been so engaged, shall have retired. The number of members in any one given classification shall not exceed twenty percent (20%) of the total active membership."

Article II Section I of the by-laws then goes on as follows:

> "Any man possessing the qualifications prescribed in Article V, Section 4 of the Constitution of Kiwanis International may be elected to active membership in a chartered club."

Obviously, both by Kiwanis' *own* membership qualifications and by actual practice, the organization is a business organization and not some small select group meeting in individual members' homes for purely social reasons. The attorney for Kiwanis International strenuously denies that Kiwanis is a business organization. There is no affidavit submitted by an officer of respondent Kiwanis International. In contrast, the record is replete with affidavits submitted by the petitioners in opposition to the motion to dismiss establishing that Ki-



wanis International is a business organization. Petitioners submit portions of those affidavits for the Court's attention: *Excerpt from Affidavit of Florence Bromley*

> ". . .your deponent is a licensed real estate broker within the Great Neck community and has served as president of the Great Neck Real Estate Board as well as Vice-President of the Great Neck Chamber of Commerce. Your deponent became a member of plaintiff, Kiwanis Club of Great Neck, Inc., in 1974 for the purpose of serving the community in which she conducted her business as well as for the purpose of making commercial and business contacts within the setting of a service club. Since your deponent has become a member of plaintiff, Kiwanis Club of Great Neck, Inc., she has made valuable business contacts and associations, all of which have furthered the development of her business within the community." *Affidavit of Florence Bromley*, R. 32.

*Excerpt from Affidavit of Drew Richards*

> "At all of the meetings of Kiwanis that I have attended it has been customary for me to give my name and state my occupation.
>
> I have a member of Kiwanis Club of Great Neck, Inc., since 1948. When I joined I was employed by the Frigidare Sales Corporation, division of General Motors Corporation. My opinion at that time was sales manager in the apartment and builders division.
>
> Since I have been a member of Kiwanis Club of Great Neck, Inc. I have noticed that most Kiwanians will turn to fellow Kiwanians when business opportunities present themselves. In my own case, I turned to fellow club members for the following needs: Veterinarian, Attorney, Dentist, Opto-

metrist, Oil Supplier, Hardware, Banker. When one of the club members was building a 350 family apartment house for which he needed electric refrigerators, he turned to me to supply his order. I would not have made the aforesaid mentioned business contacts and sales orders were it not for my association and membership in Kiwanis Club of Great Neck." *Affidavit of Drew Richard*, R. 65, 66.

*Excerpt from Letter from The Citizens and Southern National Bank*

"It is important to the bank's business for its bank managers to participate in community affairs, and these activities provide significant opportunities for the cultivation of new business." *Letter from the Citizens and Southern National Bank*, Exhibit "B", R. 67.

*Excerpt from Affidavit of Thomas O'Neil*

"...I am assistant manager of the Hamburg Savings Bank with offices at 67-09 Fresh Pond Road, Ridgewood, New York, 11227. I have been a member of the Kiwanis Club of Great Neck since September of 1973.

As a result of my membership within Kiwanis, I have made many valuable business and professional contacts. There has been substantial benefit to myself and the Hamburg Savings Bank as a result of my membership within the club. Accounts were given to the bank by the Kiwanis Club itself and several of its members.

These contacts, associations and accounts would not have been available to me or the bank were it not for my association and membership in Ki-Wanis Club of Great Neck, Inc." *Affidavit of Thomas O'Neil*, R. 68, 69.



*Excerpt from Affidavit of Raoul Kloogman*

". . . I am a practicing physician in the Village of Great Neck. I joined the Kiwanis Club of Great Neck in 1956 and I have been a member thereof for the last nineteen years.

At all of the meetings of Kiwanis that I have attended in the last nineteen years it has been customary for me to give my name and the fact that I am a practicing physician in Great Neck.

My membership in Kiwanis has been of great professional benefit to me. Many of the members of Kiwanis Club of Great Neck have become my patients. Whenever possible I give my business to a member of the club. One of the members of the Kiwanis Club of Great Neck, Inc. has become my personal attorney. I would not have made this association with this attorney nor have developed a professional-business relationship with him were it not for my membership within Kiwanis Club of Great Neck, Inc." *Affidavit of Raoul Kloogman*, R. 70, 71.

The lower court thus had proof that while Kiwanis members meet under the guise of "public service," a member of the business community has a decided economic advantage in joining Kiwanis. Conversely, the exclusion of business and professional women deprives them of a federal right, the freedom of economic opportunity.

Since Kiwanis International does *not* come under the "private club" exception to the Civil Rights Act of 1964 and since its policy of excluding women leads to sexual discrimination in employment opportunities, the United States Supreme Court should issue a writ of certiorari and review the judgment of the New York State Court of Appeals.

## IV

It is well established that the equal protection clause of the Fourteenth Amendment bars "suspect classification," including sex discrimination. In order to invoke the Fourteenth Amendment, it must be shown that "state action" is involved, since the Fourteenth Amendment does not apply to individuals acting in a purely private capacity.

*Shelley* v. *Kraemer*, 334 U.S. 1 (1948) extended the concept of "state action." *Shelley* involved a lower court's enforcement of a restrictive covenant which precluded the sale of property to Negroes. The *Shelley* decision indicated that the action of state courts and of judicial officers in their official capacities is to be regarded as state action within the meaning of the Fourteenth Amendment.

Defendants' by-laws, Article III, Section 4, provide in part:

> "Upon final determination of revocation of the charter, and if the club is incorporated, said corporation shall be dissolved in accordance with *local statutes;* or in the event the corporation is not dissolved within one hundred and twenty (120) days, Kiwanis International has the right to petition and obtain proper orders of dissolution." (emphasis added)

Thus, Kiwanis International by the terms of its own charter provided for judicial enforcement of the discriminatory terms of its charter. This is sufficient "state action" to bring Kiwanis International within the purview of the Fourteenth Amendment's equal protection clause and to render unconstitutional the discrimination aspect of its membership policies.



## V

Ordinarily, the Supreme Court will not review the findings of a state court on a question of fact. *Grayson* v. *Harris*, 267 U.S. 352 (1924). However,

> "... where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it..." *Fiske* v. *Kansas*, 274 U.S. 380 at 385-6.

the Supreme Court will exercise its right of review.

In the New York State Supreme Court, the court of the first instance, plaintiffs requested a declaratory judgment, and presented in support of their position the previously cited affidavits, all of which stated that despite the civic purposes set forth in the Kiwanis charter, the club is in fact commercial and business oriented. Members are recruited from the business community and use their membership to improve their individual professions or businesses. These affidavits negated the defendants' contention that Kiwanis is not a base for economic opportunity.

Defendants, in opposition submitted only an affidavit from Reid Curtis, counsel for the defendants, neither a party to the action nor a member of Kiwanis. Such an affidavit is non-evidentiary in nature inasmuch as Mr. Curtis had no actual knowledge of the facts. Mr. Curtis' affidavit merely recited sections of the Kiwanis charter to ostensibly invoke the "private club" exception to the Civil Rights Act of 1964. His allegations that Kiwanis has no connection with business or trade were self-serving and conclusory. Mere quotations from the charter surely do not reveal the true nature of the organization.

The New York State Civil Practice Act, § 3212 deals with motions for Summary Judgment, and states that

"the affidavits shall be by a person having knowledge of the facts." As indicated above, Mr. Curtis' affidavit was conclusory and without knowledge of the facts.

Under *Fiske* v. *Kansas*, *supra*, a federal right has been denied to the petitioners as a result of a finding of fact having been made by the New York State Court of Appeals without evidence to support it. Summary judgment should not have been granted in favor of the defendants since they did not submit any evidence on the question as to whether Kiwanis was a private club. The only evidence submitted came from petitioners and supported the position that Kiwanis International does not fall within the "private club" exception to the Civil Rights Act of 1964.

The granting of summary judgment by the New York State Supreme Court and the subsequent affirmances of that judgment by the intermediate and then the highest state appellate court resulted in a denial to petitioners of a hearing on the issue of fact as to what is the true nature of Kiwanis.

Is Kiwanis a purely social, altruistic private club or a business-related organization which is arguably within the purview of the Civil Rights Act of 1964, and whose membership should be open to women? In view of the manner in which the "private club" issue was disposed of, the Supreme Court now has the power to review the State Court findings of fact, and to decide for itself the true nature of Kiwanis. This issue is of great importance to all woman who enter the business and professional world and seek to achieve economic progress.



## CONCLUSION

**For the foregoing reasons, the petition for writ of certiorari should be granted.**

Respectfully submitted,

CAROL EVE CASHER
200 Garden City Plaza
Garden City, New York 11530
*Attorney for Petitioners*

Dated: July 20, 1977

# APPENDIX

## APPENDIX A—Memorandum of New York State Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS
2 No. 192

KIWANIS CLUB OF GREAT NECK, INC., &ORS.,
*Appellants,*

—v.—

BOARD OF TRUSTEES OF KIWANIS INTERNATIONAL *et al.*,
*Respondents.*

(192) Carol Eve Casher,
Garden City, for appellant

Reid A. Curtis & Edward J. Hart, Merrick,
for respondents.

### Memorandum

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

The order of the Appellate Division should be affirmed. Plaintiffs failed to establish the existence of triable issues of fact which would support their claim that Kiwanis International is not within the "private club" exception to the Federal and State Constitutions and Civil Rights laws. Although the Kiwanis Clubs' community-oriented activities may extend into the public sphere, the intrusion indicated on this record is not so extensive or of the quality, as to permit governmental supervision of essentially private activity in the constitutional sense. Nor is it within the contemplation of our State's Human Rights Law. Therefore, summary judgment was properly granted.

* * * * *

Order affirmed, with costs, in a memorandum. All concur.

Wachtler, J., taking no part.

Decided April 28, 1977

## APPENDIX B—Order and Opinion of New York State Appellate Division

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on May 17, 1976.

HON. FRANK A. GULOTTA,
*Presiding Justice*

HON. M. HENRY MARTUSCELLO,
HON. HENRY J. LATHAM,
HON. JOHN P. COHALAN, JR.,
HON. J. IRWIN SHAPIRO,
*Associate Justices*

[ SAME TITLE ]

Order on Appeal from Judgment—

Civil Action or Proceeding

In the above entitled cause, the above named Kiwanis Club of Great Neck, Inc., et al., plaintiffs, having appealed to this court from a judgment of the Supreme Court, Nassau County, entered November 21, 1975, which, *inter alia*, (1) denied plaintiffs' motion for a preliminary injunction and (2) declared that Kiwanis International is a private club and that its policy of restricting membership to men only is a valid restriction; and the said appeal having been argued by Carol Eve Casher, Esq.. of counsel for the appellants and argued by Reid A. Curtis, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is:



*Appendix B—Order and Opinion of New York State Appellate Division*

ORDERED that the judgment appealed from is hereby affirmed, with $50 costs and disbursements.

GULOTTA, P.J., MARTUSCELLO, LATHAN and COHALAN, J.J., concur.

SHAPIRO, J., dissents and votes to reverse the judgment, grant the plaintiffs' application for a preliminary injunction, and to remand the action to the Supreme Court for further proceedings in accordance with a memorandum as contained in the opinion and decision slip of the court herein, dated May 17, 1976.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

## Decision of Appellate Division

Appellate Division 2nd Department

Argued: March 22, 1976

[ SAME TITLE ]

Carol Eve Casher,
Garden City, New York, for appellants.

Curtis, Hart & Zaklukiewicz,
Merrick, New York

(Reid A. Curtis and Edward J. Hart on the brief),
for respondents.

In an action *inter alia* to declare that (1) the revocation order or directive issued by defendant Kiwanis International with respect to the charter of plaintiff Kiwanis Club of Great Neck, Inc. was issued in violation of law and (2) the resolution adopted by the Kiwanis Club of Great Neck, Inc. allowing women to become members is lawful, plaintiffs appeal from a judgment of the Supreme Court, Nassau County, entered November 21, 1975, which, *inter alia*, (1) denied plaintiffs' motion for a preliminary injunction and (2) declared that Kiwanis International is a private club and that its policy of restricting membership to men only is a valid restriction.

Judgment affirmed, with $50 costs and disbursements.

Plaintiffs have failed to raise any substantial question of fact which requires a trial of the action. The record indicates that Kiwanis International is a private organization or club, not subject to the constitutional standards of the Fourteenth and Fifth Amendments to the United States Constitution or to the provisions of the Federal Civil Rights Act of 1964 (U.S. Code, tit. 42, Sec. 2000a *et seq.*) (see *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163;





*New York City Jaycees* v. *United States Jaycees*, 512 F.2d 856; *Junior Chamber of Commerce of Rochester* v. *United States Jaycees, Tulsa, Okla.*, 495 F.2d 883). We have also considered plaintiffs' arguments that the discriminatory membership practice in question violates the New York Human Rights Law and the General Business Law of New York, and find them to be without merit.

Gulotta, P.J., Martuscello, Latham and Cohalan, JJ., concur.

Shapiro, J., dissents and votes to reverse the judgment, grant the plaintiffs' application for a preliminary injunction, and to remand the action to the Supreme Court for further proceedings in accordance with the following memorandum:

The Kiwanis Club of Great Neck, Inc. (Great Neck) and its four female members brought this action for a declaratory judgment against the New York District of Kiwanis International and the Board of Trustees of Kiwanis International (the International), to nullify the provisions of the constitution and by-laws of the International, which restrict membership to men. They also sought a preliminary injunction (1) restraining the International from effectuating an order issued by it revoking Great Neck's charter because it had adopted and implemented a resolution allowing women to become members and (2) directing the defendants to reinstate Great Neck as a full member and to restore to it all privileges to which it was entitled by reason of its association with Kiwanis International.

Special Term denied plaintiffs' motion for a preliminary injunction and, upon defendants' cross motion for dismissal of the complaint, declared that the "men" mem-

bership restriction was valid. This court is upholding that determination. I am in complete disagreement with Special Term's holding and this court's affirmance thereof, believing, as I do, that there is at least a question of fact as to the validity of the "male" restriction provisions and that, therefore, the preliminary injunction sought by plaintiffs should be granted so that the *status quo* may be maintained until after a trial of the issues is had.

THE ISSUES

The major issue on this appeal is whether the judgment appealed from, which holds that the revocation order and directive issued by the International with respect to the charter of the plaintiff club was properly issued, involved State action, thus denying the plaintiffs the equal protection of the laws under the Fourteenth Amendment to the United States Constitution. A second issue is whether the Kiwanis International is in fact a private club so that its denial to women of membership in its affiliate local clubs because of their sex, with concomitant effect on the ability of those so excluded to participate profitably in a business or profession, violates State and Federal guarantees against such discrimination by other than private clubs. A third issue is whether, in determining on the basis of the affidavits of the parties that the International is a private club and therefore free to use a discriminatory qualification limiting eligibility for membership to men only, Special Term committed error, since the fact question of whether the International is a private club rather than an organization which acts as a forum in which members seeking business and professional opportunities meet and advance their individual corporate, economic and commercial interests is put into serious factual dispute by those affidavits.



THE PRIOR PROCEEDINGS

Great Neck is a corporation organized under the laws of the State of New York. The four female plaintiffs are members of Great Neck, which was a chartered local club of the Kiwanis International, within its Long Island North Division of its New York District of Kiwanis International. On October 1, 1973 plaintiff Great Neck accepted the four individual plaintiffs as members and, on January 3, 1974, it adopted a resolution which permits women to become members. The defendants thereafter notified Great Neck that it was in violation of the International's constitution and by-laws and that a hearing would be held before the Board of Trustees of the International on April 27, 1974. Prior thereto the International returned to Great Neck the magazine subscriptions paid for by the women plaintiffs as well as their membership dues. After the hearing, the International notified Great Neck that its charter was being revoked. On July 16, 1974 Great Neck appealed the revocation to the 1975 convention of the International. That appeal, which exhausted Great Neck's remedies within the International, was denied. Under the International's constitution and by-laws, after there is a final determination that a charter should be revoked, the International, if the club is incorporated, has the right to petition the appropriate court for an order of dissolution of the local organization.

Great Neck's complaint charges that the International's revocation of its charter violated the public policy and laws of the United States and of the State of New York including, but not limited to, titles II and VII of the Federal Civil Rights Act of 1964 (U.S. Code, tit. 42, sec 2000a *et seq.*) and section 340 of the General Business Law and article 15 (Human Rights Law) of the Executive Law of the State of New York.

In support of the motion for a preliminary injunction, Jack Perlman, the president of Great Neck, by affidavit, contended that the provisions of the International's constitution and by-laws which barred women from membership in member clubs incorporated or operating in New York State were null and void because they violate the public policy and laws of the State, which bar discrimination against women, by excluding them from Kiwanis clubs, which "are an integral part of the commercial community in which such members of the female sex must compete." The same affidavit notes that section 4 of article IV of the constitution and by-laws of Kiwanis International provides:

> "Upon final determination of revocation of the charter, and if the club is incorporated, said corporation shall be dissolved in accordance with local statutes; or in the event the corporation is not dissolved within one hundred and twenty (120) days, Kiwanis International has the right *to petition and obtain proper orders of dissolution*" (emphasis supplied).

Florence Bromley, one of the individual plaintiffs, also submitted an affidavit in support of the motion for a preliminary injunction in which she stated that she is a licensed real estate broker in Great Neck, that her reasons for becoming a member of the Kiwanis Club of Great Neck, Inc. were to serve the community in which she conducted her business and to make "commercial and business contacts" within the setting of a service club and that she had thereby "made valuable business contacts and associations, all of which have furthered the development of her business within the community."

Defendants cross-moved to dismiss the complaint for failure to state a cause of action and/or for summary



judgment. Their attorney's supporting affidavit quotes (with certain apparent inaccuracies) from article II of the International's constitution, which reads:

> "Section 1. The Objects of Kiwanis International shall be:
>
> To give primacy to the human and spiritual, rather than to the material values of life.
>
> To encourage the daily living of the Golden Rule in all human relationships.
>
> To promote the adoption and the application of higher social, business, and professional standards.
>
> To develop, by precept and example, a more intelligent, aggressive, and serviceable citizenship.
>
> To provide, through Kiwanis clubs, a practical means to form enduring friendships, to render altruistic service, and to build better communities.
>
> To cooperate in creating and maintaining that sound public opinion and high idealism which make possible the increase of righteousness, justice, patriotism and good will."

He then argues that these "idealistic and spiritual" objects have "nothing to do with business or commerce in a direct fashion", overlooking or disregarding the fact that the International's constitution, *inter alia*, declares that one of the purposes of its creation is encouraging "the adoption and application of higher * * * * business and professional standards" and "to provide, through Kiwanis clubs, a practical means to form enduring friendships". The affiant nowhere sets forth whether

and how the practice in Kiwanis clubs conforms to the high altruistic goals set forth as objects of the International; nor does he negate what is common knowledge, that the Kiwanis are clubs consisting largely of businessmen and professionals who meet at regular intervals in order to get to know each other and to use the resulting acquaintanceships and friendships to advance their business and commercial interests, as did the female plaintiff who submitted her affidavit in support of the motion for the preliminary injunction.

Defendants' attorneys' affidavit also notes that article IV and V of the International's constitution specifically require local clubs to comply with the constitution and by-laws on pain of expulsion, and that section 4 of article V of the constitution declares:

> "a. The active membership of this club shall consist of men of good character and community standing residing or having other community interest within the area of this club."

He also notes that article II of the by-laws provides:

> "a. Any man possessing the qualifications prescribed in Article V, Section 4 of the Constitution of Kiwanis International may be elected to active membership in a chartered club.
>
> "b. No man shall be eligible to membership in a club who holds membership (other than honorary) in any other Kiwanis club or other service club of like character."

The affiant declares that the "only question before the Court is whether a purely private club or organization with the objectives expressed by Kiwanis may eliminate



women as members." However that begs the question, for it assumes that Kiwanis is "a purely private club". But his own assertions that the Kiwanis International has "idealistic and spiritual" objects having "nothing to do with business or commerce *in a direct fashion*" (emphasis supplied) and that the "clubs' objects are to instill ideas of righteousness, justice, patriotism and good will," certainly do not indicate that the clubs are "purely private". Rather, they indicate that the International wishes to benefit the public generally and to eschew any claims of privilege or exclusiveness. Furthermore, I fail to find any credible evidence in the record (as distinguished from conclusory assertions) that the Kiwanis clubs are "purely private", have "purely private" purposes, or should be left free to use the discriminatory standard of sex to limit admissions even though their claimed right in that regard is based upon an irrational ground and can serve only to enhance the difficulty of achieving the International's objects as set forth in article II of its constitution.

International's attorney seeks to dispose by fiat of the question whether the case involves issues of fact by asserting: "There are no real issues of fact". But despite this dismissal of the question, there remains the real fact issue whether Kiwanis clubs, in soliciting membership from professional and business people to achieve the high altruistic goals set forth in its constitution as its objects, might not also bring economic benefits to its individual members. There also remains the question whether those objects could not better be achieved by the maintenance of membership admission standards which relate rationally to those goals by soliciting the assistance, through membership, of all citizens who support such goals rather than by maintaining an irrational policy of exclusion of one-half of the world because of sex.

A private club is one which is purely social in purpose, or which has some single narrow purpose which benetfis the selfish interests of its members, such as golf clubs, social clubs, swimming clubs, recreational clubs, etc. and which establishes *prior* congeniality with those already members as a test of membership eligibility. Nothing in the stated objects of the International indicates that it meets the standards of a "purely private club". To define a "private club" as being one "not in fact open to the public" is to allow every club to become "private" merely by barring some small segment of the public. It is a limitation which carries within itself the seed of its own easy evasion.

The balance of the affidavit in support of the defendants' cross-motion to dismiss contends that International and its affiliates are "totally outside of 'normal commercial activity' "; that it is difficult to understand how the exclusion of the women plaintiffs from membership would in any way deny them opportunities in commerce; and that if they joined the Kiwanis to make commercial and business contacts, they were engaging in "crass commercialism" and not operating within the objects of the Kiwanis.

The plaintiffs submitted affidavits by their counsel and three male members of the plaintiff club and some exhibits in opposition to the defendants' cross-motion. Plaintiffs' attorney's affidavit contends that the affidavit in support of the cross-motion made it clear that there were real issues as to whether the defendants were in fact a purely private club rather than one which has commercial aspects and which mixes business with civic activity. They pointed out that at trial they planned to introduce evidence to show that corporations, utilities and banking institutions paid the Kiwanis dues of their



employee members and took such payments as business deductions.[1] They also stress the fact that the plaintiff club had a valid contract and property interest in pursuing its legal existence within the Great Neck community and that the women plaintiffs had a similar economic interest in obtaining membership therein, arguing, and I think with plausibility, that the equal employment opportunity protected by the Executive Law includes the business opportunities implicit in the business contacts made within the confines of a service club. In effect, their contention is that clubs, such as the Kiwanis, which hold themselves out as servicing the general public, thereby become places of public accommodation.

## The Decision at Special Term

Special Term's judgment denied the plaintiffs' motion for a preliminary injunction and, on defendants' cross-motion, adjudged that (1) the Kiwanis International is a private club and that its policy restricting membership to men only is a valid restriction, (2) the denial of membership in the Kiwanis International to women is in no way violative of any constitutional or statutory provision, Federal or State, (3) section 340 of article 22 of the General Business Law "is not applicable to this situation", (4) section 290 of the Executive Law "is not applicable to this case", (5) the revocation order and directive issued by the International with respect to the charter

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[1] An exhibit attached to one of the affidavits is a letter from a bank, which states that the bank pays expenses and dues for its employees to be members of service clubs and that:

> "It is important to the bank's business for its bank managers to participate in community affairs, and these activities provide significant opportunities for the cultivation of new business."

of Great Neck was properly issued and (6) the resolution adopted by Great Neck, allowing women to become members, was violative of its charter provisions.

In its accompanying decision Special Term found that the defendants "appear to meet the standards and criteria by which an organization must qualify if it is truly a private club as outlined in the case of Wright v. Cork Club, 315 Fed. Sup. 1143, U.S.D.C., S.D. Texas (1970)." It listed those standards as follows:

"1. Concern or plan for the selection of members.

2. Standards of plan for the screening of prospective members.

3. Use of facilities primarily by members only.

4. Club members dictate the policies of the club.

5. Non profit and/or non-commercial purpose in the forming of the club." [2]

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[2] Special Term's summary setting forth of the above list of standards contained in *Wright* v. *Cork Club*, (315 F. Supp. 1143, 1153) differed from those which that court enumerated as the "minimum standards that should be met by any organization to come within private club exemption provided for in 42 U.S.C. Sec. 2000a(e)." The actual listing is as follows:

"(1) An organization which has permanent machinery established to carefully screen applicants for membership and who selects or rejects such applicants on any basis or no basis at all; (2) which limits the use of the facilities and the services of the organization strictly to members and bona fide guests of members in good standing; (3) which organization is controlled by the membership either in the form of general meetings or in some organizational form that would and does permit the members to select and elect those member officers who control and direct the organization; (4) which organization is non-profit and operated solely for the benefit and pleasure of the members; and (5) whose publicity if any, is directed solely and only to members for their information and guidance."



Rejecting section 340 of article 22 of the General Business Law and section 290 of the Executive Law as inapplicable, the first because there was no unlawful interference in the conduct of anyone's business in this case, and the second because it was "not intended to deal with membership in a private club", Special Term declared that the fact that individual members of a private club may use their membership to further their own business interests does not change the avowed purpose of the organization or convert it to a commercial club. Special Term then stated that all of the constitutional and statutory arguments advanced by plaintiffs had been urged "in an almost identical case" involving the Jaycees (Junior Chambers of Commerce), which it described as "a comparable national organization with local chapters, which also had a charter provision denying membership in any of its clubs to women", in which their "discriminatory charter provision" was sustained (*New York City Jaycees* v. *United States Jaycees*, 512 F.2d 856). It also cited a similar case which reached a similar result, *Junior Chamber of Commerce of Rochester* v. *United States Jaycees, Tulsa, Okla.*, (495 F.2d 883), adding, that since "the Jaycees is actually a Junior Chamber of Commerce whose prime object is to further the business interests of its members", those decisions "are of considerable significance in the light of plaintiffs' claims of commercialism." Special Term then concluded "that there is no valid basis to support plaintiffs' claims that Kiwanis is not a private club, or that the denial of membership to women is in any way violative of any constitutional or statutory provision, Federal or State", and that "defendants' policy of restricting membership to men may not be disturbed by it."

THE CONSTITUTIONAL QUESTION

I disagree with the conclusion of Special Term for two reasons. The first is that in this case, *unlike the two Jaycee cases relied on by Special Term*, defendants' by-laws provide, in relevant part (section 4, article IV):

> "Upon final determination of revocation of the charter, and if the club is incorporated, said corporation shall be dissolved in accordance with local statutes; or in the event the corporation is not dissolved within one hundred and twenty (120) days, Kiwanis International has the right to petition and obtain proper orders of dissolution."

Those provisions necessarily involve state action by utilization of state court judgments or decrees to effectuate an action which has for its goal the discriminatory exclusion of women, because of their sex, from membership in any Kiwanis club. Although *Shelley* v. *Kraemer* (334 U.S. 1, 13) declares that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful", it also declares that there is "state action" in violation of that amendment when the private person or group engaging in such discriminatory or wrongful conduct seeks to achieve such discrimination by "judicial enforcement by state courts of the restrictive terms" of its discriminatory provisions. This is precisely what the International did when it included section 4 of article IV in its by-laws. In that provision it established a means for obtaining "judicial enforcement by state courts of the restrictive terms" in its constitution and by-laws which bar women from membership when an offending club which admits women as members refuses to surrender its charter voluntarily. True it is



that here, unlike *Shelley*, the enforcement compulsion of the state authorities would be directed against the club violating the ban on women by revoking its corporate charter, rather than against the women members, but the ultimate effect is the exclusion of women as members by ousting the local clubs which admit them from affiliation with the International. This, under *Shelley* is "state action" in violation of the Fourteenth Amendment.[3]

Here the defendant International, like those seeking to enforce the racial restrictive covenants in *Shelley*, has sought in its charter to secure for itself the power to invoke the "active intervention of the state courts, supported by the full panoply of state power" (see *Shelley* v. *Kraemer*, *supra*, at p. 19) to oust the plaintiff club because it has chosen, in disregard of the sex membership limitation, to admit the women plaintiffs who had applied for membership to join in furthering the Kiwanis' human, spiritual, altruistic goals "to encourage

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[3] Upon the argument of this appeal, when I inquired of appellants' counsel why their brief made no reference to the constitutional rule laid down in *Shelley*, she said that in her opinion that case had no application here. Since a constitutional issue is here involved, and despite that disclaimer, I note my opinion as to its relevance because here, as in *Shelley* (334 U.S. at p. 19):

> "These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government".

In relying, as I do, upon *Shelley*, I realize that that case dealt with discrimination based on race, a form of discrimination clearly within the original language and intendment of the Fourteenth Amendment, but it is also true that the equal protection clause of that amendment prevents the States from giving a mandatory preference to members of either sex over members of the other (see *Reed* v. *Reed*, 404 U.S. 71, 76-77).

the daily living of the Golden Rule in all human relationships", "to promote the adoption and the application of higher social, business and professional standards", "to develop, by precept and example, a more intelligent, aggressive, and serviceable citizenship" and to take advantage of the Kiwanis club "to provide * * * a practical means to form enduring friendships". Here, too, the action of the Special Term has "made available" to defendants "the full coercive power of government to deny" to the plaintiffs, on the ground of sex, "the enjoyment of property rights" in membership in the plaintiff club which the individual plaintiffs "are willing and financially able to acquire" and which the plaintiff club is "willing to sell". The "difference between judicial enforcement and nonenforcement of the restrictive" membership limitation "is the difference to petitioners between being denied rights of property available to" male members of the community, and local Kiwanis clubs which bar women as members, "and being accorded full enjoyment of those rights on an equal footing". (*Shelley* v. *Kraemer*, *supra*, at p. 19).

*Shelley* v. *Kraemer*, a landmark decision when it was handed down in 1948, is still the law of the land (see *Sullivan* v. *Little Hunting Park*, 396 U.S. 229; *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 544). Under it, when Kiwanis International by section 4 of Article IV, of its by-laws, provided that it could enforce revocation of the charter of an affiliated club which is incorporated in this State by petitioning the court for proper orders of dissolution, it established a machinery which necessarily required the invocation of state action to enforce its discriminatory ban on admission to membership of women to any of its affiliated clubs which incorporated [4]

[4] See sections 71, 72, 100 and 101 of the General Corporation Law and section 1102 of the Not-for-Profit Corporation Law.



—state action which was in violation of the Fourteenth Amendment's ban on denial of equal protection of the laws. Thus, the plaintiffs here may properly invoke the aid of the courts to prevent such unconstitutional "state" action by the defendants.

THE JAYCEES CASES

The cases relied upon by Special Term involving the Jaycees are *Junior Chamber of Commerce of Rochester* v. *United States Jaycees, Tulsa, Okla.* (495 F.2d 883 (C.C.A. 10th) cert. den. 419 U.S. 1026) and *New York City Jaycees* v. *United States Jaycees* (512 F.2d 856 (C.C.A. 2d)). In both, the plaintiffs were local affiliates of the defendant national organization. In the first case, the local affiliate brought an action against the national organization after the latter had expelled it for admitting women to membership in violation of the United States Jaycees' by-laws limiting membership to males. In the second case the plaintiff local chamber sought to enjoin the national organization from revoking its charter for adopting a by-law admitting women as members. In both cases the plaintiff local chapters relied on the Fifth and Fourteenth Amendments. In the *Rochester Jaycees* action plaintiffs also relied on the Civil Rights Act (U.S. Code, tit. 42, sec. 1983) and the Civil Rights Act of 1964, as well as the fact that the Jaycees and various state chapters thereof enjoyed tax exempt status under section 501 (c) (3) and (c) (4) of the Internal Revenue Code (U.S. Code, tit. 26) and received Federal grants and contracts from the Office of Economic Opportunity and other departments of the Federal government. *There is no indication that the revocation of the Rochester affiliate's charter in any way involved or required judicial or other state action* or that the United States Jaycees, Inc. provided in its constitution or by-laws for resort to the

courts or to a state's administrative agencies to implement any charter revocation. Neither is there any such indication or claim to that effect made in the *New York City Jaycees* case. Rather, in both cases, the plaintiff local chambers sought to establish Federal constitutional claims by relying on the fact that the Jaycees had a partial exemption from Federal taxes. In the *Rochester* case, the plaintiffs, in an effort to establish a Federal question with its concomitant of Federal jurisdiction, also cited the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972. But the Federal appeals court failed to see that there was present the essential state action (*Junior Chamber of Commerce of Rochester* v. *United States Jaycees, Tulsa, Okla., supra*, at p. 887). In the *New York City Jaycees* case, the plaintiff also relied upon the "public function" doctrine, whereby private persons performing certain functions traditionally reserved to the state may become subject to constitutional restrictions. But the United States Court of Appeals, Second Circuit, rejected this contention on the ground that the doctrine applied only to those services which are so clearly governmental in nature that the state cannot be permitted to escape responsibility by allowing them to be managed by a supposedly private agency.

There is a third case, not cited by Special Term, involving a local Jaycees unit which amended its by-laws to admit women to membership and was therefore the subject of punitive action by the United States Jaycees (*Junior Chamber of Commerce of Kansas City* v. *Missouri State Junior Chamber of Commerce*, 508 F.2d 1031 (C.C. A. 8th)). There the Kansas City Jaycees adopted its new nondiscriminatory by-law in February, 1974. It had a contract with the United States Jaycees under which the convention honoring the Jaycees' Ten Outstanding



Young Men was to be held in Kansas City. In August, 1974, the United States Jaycees, by resolution of its National Executive Committee, cancelled its contract with the Kansas City Jaycees for the convention, one of the reasons for this being the change in the Kansas City Jaycees' by-laws to open membership to women. In response, the Kansas City Jaycees brought an action for preliminary and injunctive relief under title 42 of the United States Code (Sec. 1983, Sec. 1985, subd. (3), Sec. 2971c, subd. (b)) and the First, Fifth and Fourteenth Amendments. The District Court granted a preliminary injunction against the United States Jaycees' moving the convention to another city. The United States Court of Appeals reversed and remanded, with a direction to cancel the injunction. It said (p. 1033):

> "The Supreme Court has often stated that private action, as distinguished from state action, is immune from the equal protection restriction of the fourteenth amendment. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, * * * *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 173 * * *; *Shelley* v. *Kraemer*, 334 U.S. 1, 13 * * *. The parties concede that this same reasoning requires a finding of 'federal action' before there is any deprivation of due process in violation of the fifth amendment. See *Junior Chamber of Commerce* v. *United States Jaycees*, 495 F.2d 883, 887 (10th Cir., 1974), *cert. denied*, 419 U.S. 1026, * * *; *Jackson* v. *Statler Foundation*, 496 F.2d 623, 627 n. 5 (2d Cir. 1974); *New York City Jaycees, Inc.*, 377 F. Supp. 481, 487 (S.D.N.Y.); *McGlotten* v. *Connally*, 338 F. Supp. 448, 455 n. 31 (D.D.C. 1972). In either case, it is essential to show that there is 'a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the

latter may be fairly treated as that of the State itself.' *Jackson* v. *Metropolitan Edison Co., supra,* 419 U.S. 351."

The court concluded that the plaintiff, which based its claims of Federal jurisdiction and violations of Federal statutory and constitutional provisions on the fact that the United States Jaycees and some of its affiliates had Federal tax exemption and received Federal funds for use in connection with charitable projects it was sponsoring, had failed to show the "close nexus" essential to sustain a finding that the United States Jaycees were engaged in state action or Federal action sufficient to bring into operation the provisions of the Fifth or Fourteenth Amendment, and thus to present a Federal question. In that case, too, no claim was made that the by-laws invoked to sustain the punitive action sought to be taken by the defendant United States Jaycees against the plaintiff Kansas City chapter required any resort to the courts for implementation. Hence, that decision, like the other two Jaycees cases, is distinguishable from the present litigation because neither the constitution nor by-laws involved contained a provision authorizing the defendant national organization to resort to the courts to enforce its punitive action for violation of is constitution or by-laws by local chapters.

THE IMPACT OF STATE LAW

But even if there were no Kiwanis by-law provision authorizing the International to take legal action to cancel the corporate charter of the plaintiff club by resort to state authority, thus rendering the *Shelley* case inapplicable, I would nevertheless reverse the judgment appealed from because the issue here is not a matter of either establishing state action or losing jurisdiction of the matter, but rather whether the International's effort to enforce



on its local affiliated clubs in New York State its pattern of discriminatory exclusion of women from membership violates the laws of New York State.[5] Subdivision 9 of section 292 of the Executive Law (Human Rights Law) provides, in part, that the term "place of public accommodation, resort or amusement" shall not include "any institution, club or place of accommodation which is in its nature distinctly private." While the statute does not definite the phrase "distinctly private", or the word "private", it is noteworthy that, unlike section 2000a (subd.

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[5] See *Union School Dist. No. 6* v. *New York State Human Rights Appeal Bd.* (35 NY2d 371), where the Court of Appeals distinguished its decisions in *Board of Educ. of Union Free School Dist. No. 2, East Williston* v. *New York State Div. of Human Rights* (35 NY2d 675, affg. 42 AD2d 854), both of which involved consideration of *Geduldig* v. *Aiello* (417 U.S. 484), in which the Supreme Court of the United States concluded that the equal protection clause of the Federal Constitution did not preclude a state Legislature from adopting a sex-based classification in the context of a California employee disability insurance program. The Court of Appeals there said (at p. 376):

"A quite different question was put to us. New York had adopted a statute expressly forbidding discrimination based on sex, a classification which while not foreclosed by constitutional prohibition could be proscribed by legislative enact. The question we faced then was whether the personnel policies and practices in the cases before us transgressed our statutory proscription. That they might be constitutionally forbidden was irrelevant .

The Court of Appeals also said (pp. 377-378):

"As Mr. Justice James D. Hopkins wrote in *Board of Educ. of Union Free School Dist. No. 2, East Williston* v. *New York State Div. of Human Rights* (42 A.D. 2d 49, 52, *supra*): 'the test to be applied here is not the constitutional standard under the equal protection clause, but the statutory standard of the Human Rights Law. The Human Rights Law is undoubtedly a function of the equal protection guarantee, but it reflects a more direct and positive focus.' In sum what the Constitution does not forbid may nonetheless be proscribed by statute."

(e) of title 42 of the United States Code (Civil Rights Act of 1964), the statute does not simply exclude from its coverage "a private club or other establishment not in fact open to the public", but uses the much more stringent language "any * * * club * * * which *is in its nature distinctly private*" (emphasis supplied). Hence, under the Human Rights Law, the word "private" does not, as under the Federal Civil Rights Act of 1964, encompass all places or establishments which are not in fact open to the public or, as under the Fifth and Fourteenth Amendments, which are not engaged in Federal action or state action, but rather includes only a club or organization "which is in its nature distinctly private." Under the law of New York a club may in fact not be open to the public because its limits use of its facilities or access to its meetings to members, but it may nevertheless not be a private club free from the strictures of the Human Rights Law because it is not a club which is in its nature *distinctly private.* In so framing the exemption for private clubs, the Legislature was no doubt seeking to draw a line of demarcation between the public and private sectors of our community life. It was trying to insure the carrying out of the State's responsibility, set forth in section 290 of the Human Rights Law, "to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life" and "to encourage programs designed to insure that every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the state" and "to eliminate and prevent discrimination in employment, in places of public accommodation, resort or amusement, in educational institutions", etc. It also declared that (section 291):

> "The opportunity to obtain employment without discrimination because of age, race, creed, color, national origin, sex or marital status is hereby recognized as and declared to be a civil right."



In defining places of public accommodation, the Legislature recognized that when it barred operators of such places from engaging in discrimination based on race, creed, color, national origin, sex, or marital staus, it was exercising the State's police power to compel personal associations in such places and was therefore raising questions of possible interference with the right of privacy. By including in its definition of a place of public accommodation a specific exception for clubs which were in their nature *distinctly private*, it conceded that members of genuinely private clubs have a substantial privacy interest with respect to membership practices, and that since their "members having genuinely chosen each other as social intimates, the club functions as an extension of their homes" (see *Cornelius* v. *Benevolent Protective Order of Elks*, 382 F. Supp. 1182, 1202 (D.C. Conn. 1974); see also, *Wright* v. *Cork Club*, 315 F. Supp. 1143, 1156-57 (S.D. Texas 1970)). As Judge Blumenfeld pointed out in the *Cornelius* case (*supra*, at p. 1202):

> "In delimiting the right to privacy, two inquiries are essential. First, the strength of the particular claim to privacy asserted must in some manner be measured. Second, the state must demonstrate that it has a legitimate interest in proscribing the questioned conduct of sufficient strength to override the claim to privacy."

The appellants here make no contention that the defendant International is a place of public accommodation; nor, for that matter, is it, for it does not offer any services to the general public. Rather, Great Neck and the individual plaintiffs base their claim for relief on the fact that, in the cases of the individual plaintiffs, they are being deprived of possible access to additional sources of income, and, in the case of Great Neck, it is

being deprived of expanded influence and effectiveness in achieving its goals locally. The International as part of its defense, attacks this contention and argues that the stated "idealistic and spiritual" objects of the Kiwanis have "nothing to do with business or commerce". But the latter claim is qualified by the phrase, "in a direct fashion", which, as I have noted, may well flow not only from the fact that the stated objects of the Kiwanis include both a reference to encouraging the adoption "of higher * * * business and professional standards" and to the provision, through Kiwanis clubs, of "a practical means to form enduring friendships", but also from the fact that the membership of Kiwanis clubs does, in fact, consist of businessmen and professionals, and the practice of the clubs is to have each of the members, at a meeting, announce his name and business or profession to the others present. Further, there is no denial of the statements of one of the individual plaintiffs, and of other individual members who submitted affidavits, that they did benefit economically from their membership in the Kiwanis by obtaining business from other Kiwanis members.

Taking those self-betterment-in-business allegations in the affidavits as true (though possibly "crass"), the question is whether the Human Rights Law created rights for the plaintiffs which must be enforced by this court. Section 290 of that Law, heretofore referred to, declares that "the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life", and creates a division "to encourage programs designed to insure that every individual shall have an equal opportunity to participate fully in the economic * * * life of the state". Section 291 declares the "opportunity to



obtain employment without discrimination because of age, race, creed, color, national origin, sex or marital status" to be a "civil right". Although section 292 contains definitions of "employment agency", "employer" and "employee", it contains no definition of "employment". Section 300 declares that the "provisions of this article shall be construed liberally for the accomplishment of the purposes thereof." When it is recalled that the Legislature, when it enacted the Human Rights Law, did not see fit to embody in it a provision which limited the term employment to matters involving an employee-employer relationship, *the only conclusion that can follow from the foregoing provisions of the statute is that the Legislature intended them to encompass the right of self-employed professionals and persons engaged in business to have access, without discrimination based on sex, to groups or clubs other than those distinctly private in their nature and which give to the members additional potential sources of patronage or business.* Since the individual plaintiffs may invoke the aid of the statue, and the courts, to protect that "civil right" established by sections 290 and 292, and as Great Neck may also do the same to prevent the International from compelling it, at the risk of losing its charter as a Kiwanis club, to engage in actions which violate that civil right of the individual plaintiffs, I would reverse the judgment appealed from, grant the preliminary injunction sought by plaintiffs, and sustain the complaint as setting forth a valid cause of action on which there should be a plenary trial.

## APPENDIX C—Judgment of New York State Supreme Court, Nassau County

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of Nassau, at the Courthouse thereof, located at Supreme Court Drive, Mineola, New York on the 19 day of November, 1975.

Present: HON. ALEXANDER BERMAN,
*Justice*

Index No. 9843/75

KIWANIS CLUB OF GREAT NECK, INC., FLORENCE BROMLEY, CLARA HAFT, VIRGINIA NATHANSON *and* SUNYA STRICK,
*Plaintiffs,*

FOR A DECLARATORY JUDGMENT

*—against—*

BOARD OF TRUSTEES OF KIWANIS INTERNATIONAL

*—and—*

THE NEW YORK DISTRICT OF KIWANIS INTERNATIONAL,
*Defendants.*

The plaintiffs having moved this Court by way of Order to Show Cause for a preliminary injunction enjoining the defendants, their agents, servants, employees and attorneys, either directly or indirectly enforcing any of the provisions of the constitution and by-laws of Kiwanis International with respect to charter revocation within the State of New York or as applied to the plaintiffs herein; taking possession without plaintiffs' consent of any of the insignia of Kiwanis International including but not limited to the flag and seal; and proceeding to carry out any plan of corporate dissolution with regard



to plaintiff, Kiwanis Club of Great Neck, Inc., and a cross-motion having been made by the defendants for an Order dismissing the plaintiffs' complaint by reason of its failure to state a legal cause of action and/or for summary judgment and for denial of plaintiffs' motion for a temporary injunction, and said motion and cross-motion having come on to be heard before me on the 6th day of October, 1975.

Now, upon reading and filing the Order to Show Cause of the Honorable Steven B. Berounian dated July 8, 1975,, and upon the affidavit of Jack Perlman, sworn to the 1st day of July, 1975 in support thereof, the affidavit of Florence Bromley, sworn to the 1st day of July, 1975, in support therof, and the affirmation of Carol Eve Casher, Esq., dated July 1, 1975, and upon the Cross-Notice of Motion dated August 4, 1975 and the affidavit of Reid A. Curtis, Esq., sworn to the 4th day of August, 1975 in support thereof, and upon the affirmation of Carol Eve Casher, dated September 4, 1975 in opposition to said cross-motion, and upon the affidavit of Drew Richards, sworn to the 25th day of August, 1975 in support of said motion and in opposition to said cross-motion, upon the affidavit of Thomas O'Neil, sworn to the 3rd day of September, 1975, in support of said motion and in opposition to said cross-motion, upon the affidavit of Raoul Kloogman sworn to the 9th day of Sept., 1975 in support of said motion and in opposition to said cross-motion and upon the reply affidavit of Reid A. Curtis, Esq., sworn to the 8th day of September, 1975, and due deliberation having been had thereon, the Court having rendered its decision dated October 13, 1975, and said decision having been duly filed.

Now, on motion of Carol Eve Casher, attorney for the plaintiffs, it is,

*Appendix C—Judgment of New York State Supreme Court, Nassau County*

Declared and adjudged as follows:

1. That the Kiwanis International is a private club and that the policy of said Kiwanis International restricting membership to men only be and the same is a valid restriction.

2. That the denial of membership by Kiwanis International to women is in no way violative of any constitutional or statutory provision, federal or state.

3. That Article 22, Sec. 340 of the General Business Law of the State of New York which prohibits unlawful interference with the free exercise of any activity in the conduct of any business is not applicable to this situation.

4. That the Executive Law of the State of New York, Sec. 290 (Human Rights Law) is not applicable to this case.

5. That the revocation order and directive issued by Kiwanis International with respect to the charter of plaintiff, Kiwanis Club of Great Neck, Inc., was properly issued.

6. That the resolution adopted by the Kiwanis Club of Great Neck, Inc. allowing women to become members is in violation of its charter provisions.

7. That the motion by plaintiffs for a preliminary injunction be and the same is hereby denied.

8. That the cross-motion of the defendants for dismissal be and the same is hereby denied.

Enter

s/ ALEXANDER BERMAN
Justice, Supreme Court

Granted:
Nov. 19, 1975
Entered:
Nov. 21, 1975

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-140

KIWANIS CLUB OF GREAT NECK, INC., FLORENCE BROMLEY, CLARA HAFT, VIRGINIA NATHANSON and SUNYA STRICK,

*Petitioners,*

For a Declaratory Judgment

*—against—*

BOARD OF TRUSTEES OF KIWANIS INTERNATIONAL and THE NEW YORK DISTRICT OF KIWANIS INTERNATIONAL,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENTS

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REID A. CURTIS
EDWARD J. HART and
FRANCIS E. ZAKLUKIEWICZ
*On the Brief*

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IN THE

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENTS

## Preliminary Statement on Behalf of Respondents

### Facts

This application arises out of declaratory judgment proceeding against Kiwanis International and The New York District of Kiwanis International, seeking to void and nullify those provisions of the Kiwanis Constitution and By-Laws which restrict membership to "men".

There is no real dispute of fact involved in this case; it is rather a pure question of law. Plaintiff, Kiwanis Club of Great Neck, Inc., was a duly chartered local club of Kiwanis International. It was formed, organized and operated pursuant to the Constitution and By-Laws of Kiwanis International.

Some time in 1973-1974, several women (including at least the four female plaintiffs) were admitted to membership by the local club, despite the provisions of the International Constitution and By-Laws.

The International organization, upon being advised of this activity, told the local club that this was forbidden and, when they refused to change their status, the Board of Trustee of Kiwanis International met in session and voted a revocation of the membership charter of Kiwanis of Great Neck.

Kiwanis of Great Neck was advised of this activity and of their right to appeal to the next general convention of the International body which took place in June, 1975, at Atlanta, Georgia. The plaintiffs took advantage of this right of appeal and personally attended at the convention in the person their lawyer, Carol Eve Casher. They made their presentation; it was duly considered and very strongly voted down as an appeal.



Faced now with the execution of the revocation of their charter, the present lawsuit was instituted seeking a declaratory judgment to the effect that the Constitution and By-Laws are null and void because they discriminate against women by reason of the provisions of the Fifth and Fourteenth Amendments of the United States Constitution, the New York State Constitution, the Federal Civil Rights Law, Section 340 of the General Business Law of New York, and Article 15 of the Executive Law of New York.

In connection with the institution of this lawsuit, the plaintiffs moved for a temporary or preliminary injunction by order to show cause. This temporary injunction order to show cause motion came on for hearing, at which time there was also before the court a cross-motion by the defendants for a dismissal of the complaint herein, on the ground that it failed to state any legal cause of action and/or for summary judgment in favor of the defendants. The motion for summary judgment was granted and it is from that determination that this appeal is taken as the determination was sustained by the Court of Appeals of the State of New York.

There was submitted in connection with said cross-motion, and in opposition to the motion for preliminary injunction, an affidavit setting forth in detail the various allegations of the complaint, the provisions of the Constitution and By-Laws of Kiwanis International and pointing out to the court the objects of Kiwanis, and the apparently incorrect belief of the president of the plaintiff Kiwanis of Great Neck, and of Ms. Florence Bromley, in which they seem to believe that the organization is involved directly in commerce, interstate or intrastate, and that they are being deprived of a right to make monetary gain by business contacts as members of this organization.

The line by line delineation of the papers, of the said Constitution and By-Laws and of the affidavits will not be unnecessarily repeated in this brief.

There is no claim in the moving papers, nor in the pleadings of any Federal or State government interest in the organization or operation of Kiwanis International or, for that matter, of the local club. The thrust of the complaint is that any organization which limits its membership to "men" thereby discriminates against women and that such discrimination is forbidden by the Constitution.

## Submission of the Defendants-Respondents

The determination of the Supreme Court, County of Nassau, at Special Term, should be sustained as the petitioners failed to demonstrate a Federal or state government interest in the respondents' organization such as to make the by-laws and organization constitution in question constitutionally impermissible under U. S. or New York Constitutions.

It is the further submission of the defendants-respondents that to force the admission of women under the color of statute would be an invalid constitutional intrusion as far as the rights of the defendants-respondents are concerned.

The instant brief contains all points as they were made in the Courts of New York State including Points II and III which referred to state statutes upon which petitioners relied in part in the New York State Courts. The last is done so that this Court can have the benefit of the full argument made.



It is the position of the respondents that a Writ of Certiorari should not be granted under the terms of Rule 19 (1) of the Rules of the Supreme Court of the United States. It is submitted that no question is raised in the petitioners application this has not been decided by the Court. The question of the applicability of the Fifth and Fourteenth Amendments to private clubs has been ruled upon by this Court as will appear in the brief in chief. The determination is supportive of the respondents position.

In addition it is contended by the respondents that there is no basis for this Court to inquire into and reverse the factual findings of the Courts below as these findings were sufficiently supported by the evidence.

Lastly, it is submitted that if members of private clubs were to run the risk of being determined to be public vehicles if their members coincidentally discussed business matters this would have a chilling effect on the First Amendment free speech rights of their members. They would be faced with a constitutionally impermissible inhibition of the right of freedom of discussion. It is clear that a club whose purposes are non-business may choose its members without violating the United States Constitution.

## POINT I

**Kiwanis International is a private activity, a private club, whose objects have no connection with commerce, business or trade, and as such is not subject to any discriminatory regulations under the Fifth and Fourteenth Amendments of the United States Constitution and/or the Constitution of the State of New York.**

One of the latest cases which deals with the very point now before the court is *New York City Jaycees, Inc.,* v. *United States Jaycees, Inc.,* 512 F. 2d 856. This case was decided March 7, 1975, by the United States Court of Appeals for the Second Circuit (including New York).

In this case, the defendant United States Jaycees, Inc., the national parent organization, threatened to revoke the charter of the New York City Jaycees, Inc., "because it had admitted women to membership." Thus we deal with almost exactly the same issue presented by the instant litigation. The United States District Court, Southern District, held that, because the Jaycees were in receipt of substantial government funding (amounting to 31.4% of its total budget) from Federal funds, its assumption of certain civic functions and its tax exempt status, it was thereby subject to constitutional limitations and could not discriminate against the female.

This decision of the lower court was reversed by the Circuit Court of Appeals, despite the above claims. The court in its decison states:

> "Plaintiff concedes, as it must, that private action is immune from the restrictions of the Fifth and Fourteenth Amendments. (Citing cases). However, plaintiff claims that National's receipt of federal funds and tax exemptions, as well as its performance of civic functions, constitutes state action sufficient to subject to it scrutiny under the constitutional standard. We disagree.
>
> "(i) The mere existence of government ties to a private organization is not sufficient to support a finding of state action. (Citing cases). • • •. The Supreme Court has recently reaffirmed the principle that the determination of state action must be based on a particularized inquiry focusing on whether there is 'a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State iself.' (Citing cases). In this case the requisite connection between government and the offending activity has not been shown. Plaintiff does not charge discrimination in the operation of federally funded Jaycee programs; indeed such a claim could not be supported since not only do women participate both in the selection of local recipients for funding and in the implementation of programs but also the benefits of all federally funded Jaycee programs are distributed without regard to sex or other impermissibly discriminatory criteria. *Plaintiff's constitutional challenge is addressed solely to the internal membership policies of the Jaycees; yet plaintiff has made no showing that the government is substantially, or even minimally, involved in the adoption or enforcement of these policies.*
>
> "(2, 3) This is not case where 'the State has so far insulated itself into a position of interdependence with (the private enterprise) that it must be recognized as a joint participant in the challenged acivity • • •.' (Citing case) • • •. The mere

receipt of public funds does not convert the activities of a private organization into State activities (Citing cases). * * *.

"(4) Similarly, the grant of tax exemptions to the Jaycees does not constitute significant government involvement in the organization's exclusionary membership policy. As the Supreme Court has pointed out in the context of a First Amendment challenge to tax exemptions granted to religious organizations, a tax exemption does not constitute government 'sponsorship' but instead created only a minimal and remote involvement' (Citing cases). No genuine nexus between the tax exemption and the complained of internal membership policies has been shown and in its absence, there is no constitutional wrong.

"* * *. In fact, this Court has expressly recognized the 'value of preserving a private sector free from the constitutional requirements applicable to government institutions.' (Citing case). * * *. Furthermore, the Supreme Court in its recent decision in *Jackson* v. *Metropolitan Edison Company, supra,* has suggested that the service involved must not only be one which is traditionally the exclusive prerogative of the State, but that it must in addition be one which the State itself is under an affirmative duty to provide. (Citing case). In *Jackson* the Court specifically declined to find a State action on a public function theory despite the fact that the defendant was a utility company, provided an essential public service, enjoined a State protected partial monopoly, and was subject to extensive regulation by the State * * *.



"We therefore find ourselves in agreement with the Eighth and Tenth Circuits which, in reviewing suits brought by other complainants against the internal policies of the Jaycees, have similarly held that the requisite State action was lacking. (Citing cases). The Jaycees is a private organization acting in connection with its own enterprise, and the Federal Courts have no power to grant an injunction prohibiting its discriminatory membership policies."

Certainly, a much stronger argument can be made concerning a Junior Chamber of Commerce operation as being connected with "Commerce, Trade or Business" than can be made for the idealistic objects of Kiwanis International.

Plaintiffs in the complaint and the moving papers make no attempt to show any state or Federal government interest in Kiwanis and thus fail to state a cause of action because as the court above quoted stated:

"* * * Private action is immune from the restrictions of the Fifth and Fourteenth Amendments."

We find that the United States Court of Appeals, Tenth Circuit, reached exactly the same conclusion in *Junior Chamber of Commerce of Rochester, Inc., Rochester, New York* v. *United States Jaycees, Tulsa, Oklahoma,* on April 16, 1974, 495 F. 2d 883. Again, the court was dealing with a limitation of membership to males. The national organization revoked the charter of the local organization because they admitted women. The court disagreed and the appellate branch affirmed a dismissal of the complaint. We find the following language in the decision:

"The controversy was the result of the United States Jaycees' By-laws limiting membership to

males. On this account the Junior Chamber of Commerce of Rochester was expelled from the United States Jaycees because it had chosen to admit women as members. * * *"

Claims were made of substantial tax benefits under the Internal Revenue Act, Federal grants and contracts from OEO and other departments of the Government and that Jaycee organizations used Federal funds to sponsor HEW programs, including housing projects and assistance to under-privileged children.

The court then states:

"From all of this, it is the position of the plaintiffs that the United States Jaycees is in practical effect an arm of the government and that therefore when it discriminates in its membership policies, it is acting officially. On this basis, appellant's claim that their rights are subject to the protection of the Fifth and the Fourteeth Amendments * * * and are violated by the Jaycees exclusionary membership policies.

* * *

"There is no dispute about the invalidity of discrimination by the State or Federal Government based on sex and there is no dispute about the fact that the plaintiffs were excluded from membership in the organization purely on the basis of sex. Therefore, the only issue is whether the discrimination can by reason of the circumstances present be considered official (State or Federal) action. It must also be conceded that private discrimination does not give rise to a constitutional violation. See *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 92 S. Ct. 1965, 32 L. Ed. 2d 627 (1972)."



It is quite obvious from these decisions that there must be Federal or state connection with the organization before it can be subject to these alleged anti-discriminatory laws. This case also involves the Federal Civil Rights Law and dismissed its application under these circumstances.

We find the following in the court's language:

"The first question is whether there is a violation of 42 U.S.C. Section 1983 which gives a remedy to persons whose civil rights have been invaded by officers acting under color of State law. Although plaintiffs have invoked this provision they have not emphasized the official State action approach. Rather, the thrust of their argument is that there has been a violation of their constitutional rights because of the close relationships of the Jaycees with the United States government * * *.

"(3) We fail to see that there is present the essential State action. It is one thing to say that the private organization has State character where it induces, encourages or promotes private persons to accomplish what it is constitutionally forbidden to accomplish (Citing case). We do not have such encouragement or promotion here. The constitution applies if the private action complained of is in essence the action of the government (citing case). The plaintiffs would have us rule that because the Jaycees are used by the State government to dispense funds on its behalf that all their conduct automatically becomes State action subject to a Section 1983 suit regardless of whether there exists discrimination by the private entity in the dispensing of the funds. In effect, then, plaintiffs say that the State must consistent with the Con-

stitution, refrain from dealing with discriminators regardless of whether the discrimination is related to the alleged State action. We disagree.

"Our Court has adopted a more restricted view of what is State action on at least two occasions. In *Ward* v. *St. Anthony's Hospital*, 476 F. 2d 671 (10th Cir. 1973) we ruled that a hospital which had received some governmental funding as a small percentage (5%) of its total construction funds was not subject to civil rights actions against the hospital board even though the operation of the hospital was extensively regulated by the State. It was stressed that the acts complained of did not thereby serve to clothe the hospital with sufficient State authority so as to constitute State action • • •.

• • •

"The membership policy against which the attack has been leveled has no connection with the State activity of the United States Jaycess. Neither the complaint nor the record establishes or promises to establish the kind of State involvement essential to a civil rights action under Section 1983."

It is respectfully submitted that this case is also directly apropos to the situation presented by the instant litigation and is compelling and controlling in its authority.

Plaintiffs, as pointed out hereinbefore, rely on the fact that women are excluded and that this is necessarily discriminatory and forbidden. They apparently totally overlook the multitudinous court interpretations as to discrimination, and the Civil Rights Law, all of which exclude purely private activity from the scope of such law and constitutional provisions and forbid enforcement thereof, against private organizations.



In *Browns* v. *Mitchell*, 409 F. 2d 593, the Tenth Circuit in discussing this problem specifically says:

> "(1, 2) It is axiomatic that the due process provisions of the Fourteenth Amendment proscribe State action only and do not reach acts of private persons unless they are acting 'under color of State law.' *United States* v. *Guest*, 383 U. S. 745, 86 S. Ct. 1170, 16 L. Ed. 2d 239 (1966); *United States* v. *Price*, 383 U. S. 787, 86 S. Ct. 1152, 16 L. Ed. 2d 267 (1966) (and several other cases).
>
> "It is clear as it always had been since the Civil Rights Cases • • • that 'Individual invasion of individual rights is not the subject matter of the (Fourteenth) Amendment' • • • and that private conduct abridging individual rights does no violence to the Equal Protection Clause (and likewise Due Process Clause) unless to some significant extent the State in any of its manifestations has been found to become involved in it."

This court will see that private conduct by Kiwanis International a private club organization, even though it abridges women's rights "does no violence to the equal protection clause and the due process clause" since the state is neither alleged to be involved nor as a matter of fact are they in any way involved with the operation of Kiwanis International and/or Kiwanis of Great Neck.

In another case, again dealing with female membership, *Junior Chamber of Commerce of Kansas City, Missouri* v. *The Missouri State Junior Chamber of Commerce, and the United States Jaycees*, 508 F. 2d 1031 (decided January 8, 1975), the Court of Appeals, Eighth Circuit, reversed a lower court granting of a preliminary injunc-

tion and dissolved the same. In support of its action, the court states:

> "(1-3) The Supreme Court has often stated that private action as distinguished from State action is immune from the equal protection restrictions of the Fourteenth Amendment (Citing cases). The parties concede that this same reasoning requires a finding of 'Federal action' before there is any deprivation of due process in violation of the Fifth Amendment (Citing cases). In either case, it is essential to show that there is a 'sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself' (Citing case). • • •.
>
> • • •
>
> "(5) The mere receipt of government funds is not enough to make the action of the grantee *'Wahba' against New York University,* 492 F. 2d 96 (2d Cir. 1974) • • •. We do not think the heavy, suffocating hand of the Federal government should fall upon every aspect of the private sector."

Thus, it is well established that the private activity of Kiwanis International is not governed by the Fifth Amendment, nor the Fourteenth Amendment, nor the Federal Civil Rights Law and that the constitutional and By-laws provision restricting membership to males is a proper one with which the courts cannot legally interfere.

The plaintiffs, in their moving papers, prate upon the activities involved as "discriminatory" and certainly as impliedly "wrong". It must be urged strongly to this court that these are not substitutes for necessary Federal or state relationship which would invoke the provisions



of the Constitution and law hereinbefore set forth. In *Northrip* v. *Federal National Mortgage Association,* 372 F. Supp. 594, the court in discussing actions such as the present one states:

> "In order to sustain an action under this provision, plaintiff must demonstrate that there was State action involved in the alleged wrongful acts because the conduct of private individuals, however wrongful or discriminatory, does not come within the purview of the Fourteenth Amendment. *Hall* v. *Garson,* 430 F. 2d 430, 439 (5th Cir. 1970); • • •; *Shelley* v. *Kraemer,* 334 U. S. 1, 13, 68 S. Ct. 836, 92 L. Ed. 1161 (1948) Civil Rights cases, 109 U. S. 3, 11, 3 S. Ct. 18, 27 L. Ed. 835 (1883)."

In *Moose Lodge No. 107* v. *Irvis,* 407 U. S. 163, which dealt with membership practices of a private club (fraternal organization), the court upheld the position of Moose Lodge in its restrictive membership practices even though they held a club liquor license from the Pennsylvania Liquor Control Board which the aggrieved party contended provided a state nexus to the activity. We find a statement by the United States Supreme Court:

> "The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause, if the private entity receives any sort of benefit or service at all from the State or if it is subject to State regulation in any degree whatever. Since State-furnished services include such necessities of life as electricity, water, and the police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from State conduct set forth in The Civil Rights Cases,

*supra,* and adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discrimination,' *Reitman* v. *Mulkey,* 387 U. S. 369, 380 (1967), in order for the discriminatory action to fall within the ambit of the constitutional provision."

The court specifically pointed out in distinguishing this decision from the *Burton* case, that the "Moose Lodge is a private social club in a private building" and further in connection with the State liquor controls licensing authority for the bar said:

"Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise."

There is no contention in the moving papers nor in the pleadings that Kiwanis leases, occupies or uses government property in connection with its meetings or its activities, nor that it is other than private social organization meeting when it does, in private buildings.

Still another case dealing with the same issue of sex is *Sterns* v. *Veterans of Foreign Wars,* 353 F. Supp. 473, decided by the District Court of the District of Columbia in 1972, involving a feminine attempt to join the Veterans of Foreign Wars, whose membership clause reads that members must have served honorably "as an officer or enlisted man in the Armed Forces of the United States." Plaintiff's contention was based on the due process clause of the Fifth Amendment because a Federal charter had been granted to VFW which she contended gave a Federal tinge to the activity. The court dismissed these arguments with the statement, "This Court



has concluded that neither of plaintiff's contentions is sound."

The argument on page 9 of the petitioners' brief in support of their application that the use of the words ". . . to render altruistic service, and to build better communities . . ." relate to a "public rather than a private organization . . ." is without basis in logic. If this argument were to be accepted it would signal the end of all pro lono publico community activity on the part of private clubs such as Chambers of Commerce, veteran's groups and the like. Is it inconceivable that a prerequisite for an organization remaining private must be to act only for the benefit of its members and never for the benefit of the community.

There is no question of discrimination in employment or the use of places of public accommodation in the instant case. Indeed if as the petitioners' seem to suggest in their brief in support of their application a prospective member was candid enough to admit they joined only for commercial reasons they would not be admitted to membership as not qualifying under the respondents' charter.

See also:

*Central Hardware Co.* v. *M.L.R.B.,* 92 S. Ct. 2238;
*Arrington* v. *City of Fairfield, Alabama,* 414 F. 2d 687;
*Bond* v. *Dentzer,* 494 F. 2d 302;
*Palmer* v. *Columbia Gas of Ohio, Inc.,* 479 F. 2d 153;
*Martin* v. *Pacific Northwest Bell Tel. Co.,* 441 F. 2d 1116;
*Cook* v. *Advertiser Co.,* 323 F. Supp. 1212;

*Keller* v. *Kate Maremount Foundation,* 365 F. Supp. 798;
*Smothers* v. *Columbia Broadcasting System, Inc.,* 351 F. Supp. 622;
*Rowe* v. *Chandler,* 332 F. Supp. 336;
*Johnson* v. *Smith,* 295 F. Supp. 835;
*Mulvihill* v. *Julia L. Butterfield Memorial Hospital,* 329 F. Supp. 1020;
*Belk* v. *Chancellor of Washington University,* 336 F. Supp. 45;
*Meicler* v. *Aetna Cas. & Sur. Co.,* 372 F. Supp. 509;
*Tanner* v. *Armco Steel Corp.,* 340 F. Supp. 532.

## POINT II

**Section 340 of the New York General Business Law has no applicability.**

The opening clause of Section 340 obviously highlights its inapplicability to a membership in a private club organization. It reads:

> "1. Every contract, agreement, arrangement or combination whereby
>
> "A monopoly in the conduct of any business, trade or commerce, or in the furnishing of any service in this State is or may be established or maintained • • •."

We are not dealing with a "contract, agreement, arrangement or combination" and we are not in any way dealing with the conduct of a "business, trade or commerce." This is membership in a private fraternal organization which has idealistic aims. It is not connected with commerce, trade or business.



There are no decisions which the writer can find which in any way attempt to apply Section 340 to a membership in a private fraternal organization such as Kiwanis. It is obvious that the inclusion of this section of the law by mention in the moving papers was merely to attempt a broader base of claim, without any actual foundation upon which to proceed.

It is also obvious that what was said in the many decisions quoted above concerning the constitutional provisions and the Civil Rights Law, would apply equally in any event to the present legislation.

If Section 340 transcends the above quoted decisions as to private clubs, then said Section 340 is, per se, unconstitutional itself.

## POINT III

**The Executive Law of New York, Article 15, does not provide any basis for relief by the plaintiffs in this litigation.**

Section 290 of this law, in setting forth the purposes of the so-called "Human Rights Law," states:

> "2. It shall be deemed an exercise of the police power of the State for the protection of the public welfare, health and peace of the people of this state, and in fullfilment of the provisions of the Constitution of this State concerning civil rights."

Thus, its applicability to the present situation would be indeed far fetched. We are not dealing here with "pub-

lic welfare, health and peace." We are dealing with membership in a private fraternal organization.

Furthermore, the intent of this law is a supplement to "civil rights" and all of the decisions above quoted would have equal applicability to the present legislation. It is obvious that, not having so stated specifically, there was no intent by this law to extend its operations in a way that the Federal statutes and Constitution are not applied, and to extend it to a private organization such as Kiwanis.

The court's attention is also directed to Section 296 which defines "unlawful discriminatory practices." The court will note that it continues to refer to "employer," "employment agency," "labor organization," "employer or employment agency," "employer, labor organization or employment agency," "employer, labor organization, employment agency, or any joint labor management committee controlling apprentice training programs." It further makes specific reference to "owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement." Obviously, Kiwanis does not fall under any of these definitions and the rule of legislative and contractual construction is that the use of specific words indicates an intent and should not be then stretched beyond the imagination by including "all others."

There is also reference to "owner, lessee, sublessee, assignee or managing agent of publicly-assisted housing accommodations or other person having the right of ownership or possession" and also to "real estate broker, real estate salesman or employee or agent thereof." All of these are quite obviosuly areas in which racial and sexual discrimination may be and have been practiced. They



are for its correction. They have no application to membership in Kiwanis.

There is also reference to "education corporation or association," but this again has nothing to do with Kiwanis. Thus, as in the case of Section 340 of the General Business Law, Article 15 of the Executive Law has no application to the problem in the present litigation, is not in any way determinative thereof and has no application thereto. It cannot support the plaintiffs' claim in any way.

## POINT IV

### Kiwanis International is a private club which does not fall within the purview of the Civil Rights Act of 1964.

42 U.S.C. §2000a(e) 1964 specifically excludes private clubs from the Civil Rights Act of 1964. Subsection (e) of 42 U.S.C. §2000a(e) 1964 provides:

> "(e) The provisions of this subsection shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (6) of this section."

The very cases cited by the plaintiffs in their brief support the contention of the defendant that they are in fact a private club.

In *Wright* v. *Cork Club*, 315 Fed. Sup. 1143, U.S.D.C., S. D. Texas (1970), the court set forth the standards by which an organization must qualify if it is truly a private club. These standards are enumerated below:

1. Concern or plan for the selection of members.
2. Standards or plan for the screen of prospective members.
3. Use of facilities primarily by members only.
4. Club members dictate the policies of the club.
5. Nonprofit and/or noncommercial purpose in the forming of the club.

It is the defendant's contention and there can be no question of fact that the defendant meets the above criteria. Article II of the Constitution and By-Laws specifically sets forth the objects of the defendant Kiwanis International.

> "Section 1. The Objects of Kiwanis International shall be:
>
> "To give primacy to the human and spiritual, rather than to the material values of life.
>
> "To encourage the adoption and the application of higher social, business and professional standards.
>
> "To develop by precept and example, a more intelligent, aggressive and serviceable citizenship.
>
> "To provide, through Kiwanis clubs, a practical means to form enduring friendships, to render altruistic service, and to build better communities.
>
> "To cooperate in creating and maintaining that sound public opinion and high idealism which make possible the increase of righteousness, justice, patriotism and good will."



As can be seen from the above, the defendant has no commercial objective. The Kiwanis was formed and operates only to better the community within which it exists. It is a non-profit organization enjoying a tax-free status. The defendant cannot control the individual members' objectives in becoming members, but can only try to coincide the individual's objectives with that of the organization.

Membership in the Kiwanis is strictly limited to those individuals residing or having other community interests within the area of this club. Article V, Section 4b, of the Constitution limits membership to those individuals who are engaged in recognized lines of business, vocation, agriculture, institutional or professional life.

These limitations clearly comply with plan for membership as defined by the *Cork* case, *supra*. Further the standards for screening prospective members are also outlined in the Constitution. No one may become a member who does not meet the criteria set forth in Article V of the Constitution set forth hereinabove.

The defendant owns no facilities that are open to the public. Convention and national meetings are held in rented facilities and the purposes of the club as a whole have already been set forth above.

Clearly, the defendant is a private club within the guidelines of 42 U.S.C. §2000a(e) and is not subject to any of the provisions of the Civil Rights Act of 1964.

Defendants-respondents also urge, in support of their position, the reasoning and legal argument included in the two (2) affidavits of Reid A. Curtis incorporated in the record on appeal (pp. 38-82; pp. 159-170).

## POINT V

**No supporting proof was presented by plaintiffs-appellants as to any commercialism on the part of defendants-respondents—only proof of commercial view of Kiwanis Club of Great Neck.**

The plaintiffs-appellants allege that they have made out a case requiring trial because of the lack of opposing affidavits by officers of Kiwanis International. Kiwanis International has proven on the record by way of its Constitution and By-Laws its nature as an altruistic and idealistic organization.

Plaintiffs-appellants' sole attack on this position is based upon a number of affidavits by members of the local group of Kiwanis of Great Neck. It is respectfully submitted that the alleged commercialism prevalent in this local group does not in any way change the purpose and organization of Kiwanis International.

The local group clandestinely admitted women as members and, subsequent thereto, amended its own By-Laws justifying the same.

As soon as this came to light, the Kiwanis International promptly revoked the Charter and the local group. The local group appealed to the Convention floor and lost.

The fact that commercialism may be the reason why some members of a local group join the organization does not in any way change the status of Kiwanis International as a private club, nor does it change its idealistic goals to mere commercialism.

The only other item proffered by plaintiffs-appellants in support of their position is a letter from an alleged



officer of the Citizens Southern National Bank which indicates that this person (presumably not even a member of a service club) permits a commercial attitude among his branch managers in urging their association with local service clubs.

There is not one word in the moving papers showing any active commercialism on the part of Kiwanis International nor on the part of the New York District of Kiwanis International. The case presents solely a question of law and not one of fact.

## POINT VI

**The by-law concerning the final determination of revocation of a local charter is not constitutionally impermissible.**

The appellants' brief to this Court lays great stress on the arguments referable to constitutionality raised in the dissenting opinion of the learned Appellate Division.

The dissent of Shapiro, J. is two-pronged. It is argued that the Kiwanis International does not meet federal standards of a private club as set forth in *Wright* v. *Cork Club*, 315 FS 1143 (SD Texas, 1970).

This portion has been treated in depth above. However, for the purposes of replying to this portion of the Appellate Division dissent, it should be pointed out that the respondent has machinery for carefully screening applicants; the respondent has no physical facilities from which to exclude the public; the respondent is controlled by the membership who elect its officers; the respondent organization is non-profit for the benefit of its members and whatever publications the respondent has are directed

to its members for their information and guidance. All of the aforementioned have been established beyond peradventure.

The argument that the private club protection is lost because some peripheral economic benefit may accrue to members falls when examined against the background of reality. All private clubs are joined by some members for business as well as pleasure reasons. Lawyers sometimes join in the often-misplaced hope of gaining clients, salesmen, customers, doctors' patients, insurance agents, insureds, and so it goes. None of the aforementioned can be said to remove the private club aura as to the whole as if such were the case, no private club could survive a constitutional attack.

Turning to the argument that the by-law concerning the termination of a local chapter involves "state action by utilization of state court judgment or decrees to effectuate an action . . .", the dissent attempts to use this to distinguish the cases that are completely supportive of the respondents' position i.e., *Junior Chamber of Commerce of Rochester* v. *United States Jaycees, Tulsa, Oklahoma,* 495 F 2d 883 (C.C.A. 10th) cert. den. 419 U. S. 1026 and *New York City Jaycees* v. *United States Jaycees* (512 F 2d 856 (C.C.A. 2d) from the case at Bar.

This position, it should be pointed out, was not raised by the appellant in its complaint or at Special Term, but developed sua sponte by the one dissenting justice in the Appellate Division, Second Department. The argument for this position must fall for two reasons: First, the by-law provides that the final determination of revocation of the charter is to be made by the respondent and the necessary legal steps to terminate the local chapter are to be taken only if the local chapter is incorporated. The judicial intervention, if such becomes necessary, is



essentially ministerial, the revocation already having taken place within the framework of the respondents' executive structure, the point being that the revocation requires no judicial intervention. Secondly, most, if not all, private clubs come within the purview of the Not-For-Profit Corporation Law (successor statute to the Membership Corporation Law) and its provisions provide among other things for methods of dissolution both non-judicial and judicial (Sections 1001 to 1115) and were the submission of the dissent accepted as valid, the fact that judicial intervention is available in such situations would preclude the existence of an exclusivity provision in the by-laws of any private club which, as has been demonstrated, is not the law of the state or land.

Summing up what is being attacked is the revocation of the local charter by the respondent which is achieved without judicial intervention and therefore is not constitutionally impermissible.

## CONCLUSION

It will thus be seen that the plaintiffs have not shown any merit to their application for a temporary injunction at Special Term, nor is there any merit on the face of the matter to their complaint against the defendants, Kiwanis International and the New York District of Kiwanis International. The complaint failed to state a legal cause of action and to have allowed it to continue until reached for trial would have been an undue harassment of the defendants and would be a right to which the plaintiffs are not entitled.

Under the circumstances, the motion for temporary or preliminary injunction was properly denied, the cross-

motion of the defendants for judgment on the pleadings which was granted by Special Term should be sustained as well as the determination of the learned Appellate Division, Second Department and the Court of Appeals of the State of New York.

Respectfully submitted,

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